IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-070689 TRIAL NO. B-0700857
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
MARIO WILCOX,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Following a jury trial, defendant-appellant Mario Wilcox was convicted of aggravated robbery,[2] robbery[3] and two counts of felonious assault,[4] all with accompanying gun specifications. The trial court imposed an aggregate prison term of 25 years. Bringing forth five assignments of error, Wilcox appeals his convictions. We affirm.

At trial, Philip Wessler testified that two young black men, one in dark clothes and one wearing a light-colored do-rag, which is a head covering, had run up behind him and his friend, David Munafo, as they were walking to a party and robbed them. During the robbery, there was a fight, and Wessler was shot in the hand and the abdomen by the robber wearing the do-rag. Munafo called 911, and police officer

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[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.
[2] R.C. 2911.01(A)(1).
[3] R.C. 2911.02(A)(2).
[4] R.C. 2903.11(A)(1) and 2903.11(A)(2).

John Neal arrived at the scene. Munafo pointed out the do-rag, which was lying close to Wessler. Officer Neal placed the do-rag in a plastic bag and labeled it as "found property." A black jacket was found the next day near the crime scene.

The investigation was turned over to Detective Eric Karaguleff, who submitted the do-rag and the black coat to the Hamilton County Coroner's office for DNA testing. The do-rag had Wessler's DNA on it, as well as DNA from another unknown source. It did not contain the DNA of Darnell Nelson, who was stopped and questioned shortly after the robbery. Eleven months later, the do-rag, which was unfortunately mislabeled "found property" instead of "hold for court," was destroyed in accordance with police policy.

Approximately a year after the robbery had occurred, Karaguleff was informed that the DNA on the black coat matched that of Christopher Morrow. Karaguleff questioned Morrow about the robbery, and Morrow admitted that he, Nelson, and Wilcox had robbed Wessler and that Wilcox had been the shooter. Morrow testified against Wilcox in exchange for a two-year prison term for his part in the robbery.

Wilcox's DNA was compared to the unknown source on the do-rag, and the two matched.

In his defense, Wilcox's sister testified that Wilcox had always worn his hair in braids. This testimony was presented because Wessler and Munafo did not testify that the shooter had braids in his hair.

In his first assignment of error, Wilcox asserts that the trial court erred by admitting the results of the DNA testing on the do-rag in light of the fact that the do-rag had been destroyed and was not available for independent testing. Specifically,

Wilcox argues that the state's act of destroying the do-rag violated his due-process rights.

A due-process violation does not result from the state's failure to preserve evidence "of which no more could be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."[5] The failure to preserve potentially useful evidence does not violate due process "unless a criminal defendant can show bad faith on the part of the police."[6]

Here, Wilcox alleged that the state had acted in bad faith. But that is not demonstrated in the record. Officer Neal testified that he had accidentally mislabeled the do-rag "found property." Further, under the policy of the Cincinnati police, all evidence labeled "found property" was destroyed after one year if it was not claimed. Although the evidence was destroyed 11 months after the do-rag had been found, we still cannot say it was destroyed in bad faith, when its destruction occurred prior to Wilcox even being identified as a suspect in the robbery.

Because Wilcox did not demonstrate bad faith on the part of the state in the destruction of the do-rag, we conclude that the trial court did not err by admitting the results of the DNA tests. The first assignment of error is overruled.

In his second assignment of error, Wilcox contends that the trial court erred by conducting a hearing on his motion to suppress when he was not present for the hearing, in violation of his rights to "confrontation and due process."

The record is silent as to whether Wilcox was present at the suppression hearing. Thus, in this case, because Wilcox cannot demonstrate that prejudicial

[5] *Arizona v. Youngblood* (1988), 488 U.S. 51, 109 S.Ct. 333.
[6] Id. at 58; see also, *State v. Beavins*, 1st Dist. No. C-050754, 2006-Ohio-6974.

error occurred below, we presume the regularity of the proceedings.[7] Therefore we overrule the second assignment of error.

In his third assignment of error, Wilcox asserts that the trial court erred by denying his motion for a mistrial when, which had been made when the state elicited evidence of Wilcox's post-arrest silence.

A trial court has discretion to deny a motion for a mistrial.[8] For this reason, we will not disturb the trial court's decision absent an abuse of that discretion. An abuse of discretion suggests that a trial court's decision is unreasonable, arbitrary, or unconscionable.[9]

Here, the prosecutor asked Detective Karaguleff where he had met with Wilcox to speak with him, and Karaguleff responded, "It was in an interview room at District Five there at 1012 Ludlow. He was read his rights and he eventually within seconds said he wanted an attorney." Defense counsel objected to this statement, which the trial court sustained and the court went on to give a curative instruction to the jury.

Although it is error for the state to elicit testimony that the defendant invoked his right to an attorney for the purpose of inferring guilt, this purpose is not demonstrated in the record of this case. Detective Karaguleff made an isolated remark that the trial court instructed the jury to disregard. Under these circumstances, we cannot say that the trial court abused its discretion in denying Wilcox's motion for a mistrial. The third assignment of error is overruled.

In his fourth assignment of error, Wilcox maintains that the trial court erred by denying his second motion for a mistrial, which was made after he learned that a

[7] *State v. Byrd* (Dec. 29, 1982), 1st Dist. No. C-820119.
[8] *State v. Iacona*, 93 Ohio St.3d 83, 100, 2001-Ohio-1292, 752 N.E.2d 937.
[9] *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

juror had partially read a newspaper article about Morrow being attacked in a courtroom holding cell after he had testified against Wilcox.

In cases involving outside influence on jurors, trial courts are granted "broad discretion" in dealing with the incident and determining whether to declare a mistrial or to replace the affected juror.[10] A trial court is permitted to rely on a juror's testimony in determining that juror's impartiality.[11]

Here, only one juror had partially read the news article. That juror told the trial court that she had stopped reading the article as soon as she realized that it dealt with Wilcox's case, and she further told the court that she could still be a fair and impartial juror. Based on these circumstances, we cannot say that the trial court abused its discretion by refusing to grant a mistrial. The fourth assignment of error is overruled.

In his fifth and final assignment of error, Wilcox maintains that the cumulative effect of all the errors in his case deprived him of his right to a fair trial. Because we have held that the trial court committed no error during the prosecution of Wilcox, we overrule his fifth assignment of error.

The judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HILDEBRANDT and **DINKELACKER, JJ.**

To the Clerk:

Enter upon the Journal of the Court on November 26, 2008
per order of the Court _____.
Presiding Judge

[10] *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, at ¶191.
[11] *State v. Herring*, 94 Ohio St.3d 246, 259, 2002-Ohio-796, 762 N.E.2d 940.